CORPORATE LAW

Shareholders and Directors: Rights to Inspect the Company’s Records

IN THIS ARTICLE, DINESH SADHWANI DISCUSSES THE COMMON LAW AND STATUTORY RIGHTS OF DIRECTORS AND SHAREHOLDERS IN INSPECTING THE RECORDS OF A COMPANY.

A question that often arises is the extent to which directors and shareholders of a company are entitled to information and access to the company's records. It is often presumed by shareholders that as "owners" of the company, they are entitled to have access to all documents belonging to the company. However, as discussed below, the actual position is that shareholders and directors have different rights of inspection. Where a shareholder is also a director, this should not pose any problems. However, in circumstances where the shareholder is not a director of the company, the shareholder’s rights are limited. This is based on the legal position that a company is a separate entity from its shareholders and where the power to manage the company is generally vested in the board of directors.

Shareholders' Rights of Inspection
The right of a shareholder to inspect the relevant registers kept by the company for example, the register of members, directors, secretaries, managers and so on is expressly provided for under the Companies Act 1965 (“the Act”).

In addition, a shareholder is also entitled to inspect minutes of the company's general meetings and to receive a copy of the last audited profit and loss account and balance sheet not less than 14 days before the general meeting at which the accounts are to be presented.

Other than as stated above, shareholders do not have any overriding right to inspect the books and records of a company, such as the minutes of directors' meetings or the accounting records of the company. The shareholder may, however, be entitled to inspect the company's records if it can be shown that inspection is necessary with reference to some specific dispute or question in which the shareholder is interested and even then, such right is only granted to such extent as may be necessary for the particular occasion.

Directors' Rights of Inspection
In the case of directors, apart from sharing the same rights of inspection as the shareholders, section 167(3) of the Act provides that:

“(accounting and other records as will sufficiently explain the transactions and financial position of the company) shall be kept at the registered office of the company or at such other place in Malaysia as the directors think fit and shall at all times be open to inspection by the directors.”
By virtue of the above, directors of a company are clearly given the rights to inspect the “accounting and other records” of the company.

“Accounting records” is defined in the Act as invoices, receipts, orders for payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up while “and other records” has been defined as covering any records in a company’s possession.

The courts have held that the right of inspection of a director under section 167(3) is absolute and a director will not generally be called upon to furnish his reasons before being allowed to exercise his right of inspection. Nonetheless, such a right can be challenged or restrained if it was proved that his intention was to abuse the confidence reposed in him as director and particularly to injure the company. However, in the absence of clear proof to the contrary, the court would in such a case assume that the right was exercised for the benefit of the company.

**Discretion of the Court?**

It may be worthy to note that in a recent English Court of Appeal decision, section 222 of the UK Companies Act 1985 (which is substantially similar to section 167 of the Act) was examined and in that case, the Court of Appeal in refusing to assist a director who was shown to be invoking the right to inspect for an improper purpose, held that it was not exercising a discretion, but rather it would be recognising and giving effect to the true nature of the right of inspection. The Court of Appeal held that the right of inspection is an unqualified right accorded to a director in order for him to perform his duties and he is not required to provide any justification when exercising such a right, provided that the right is exercised in conjunction with a director’s fiduciary duty of good faith, care, skill and diligence. It would follow that it is not open to the court to refuse its assistance in a case where it has no reason to think that the director is using the right to inspect for an improper purpose.

**Motive of Inspection**

The Court of Appeal also opined that it is unnecessary to draw a distinction between an intention to injure the company and other improper purpose. The distinction, if any, to be drawn is between that of the right of inspection of a director in the proper performance of his duties and his exercise of the right of inspection not to advance the interests of the company but for some ulterior purpose. Therefore, the circumstances in which the court will refuse to enforce the right to inspect are not merely confined to those where the purpose for which the director seeks inspection is to injure the company.

**Company Under Receivership**

In the case of a company under receivership, it has been held that the directors’ access to documents and information are modified while receivership is in progress. The directors of such companies retain the right to inspect these documents subject to the qualification that such rights may not be exercised in a way that would prejudice the due progress and completion of the receivership.

**Nominee Directors**

There appears to be no clear judicial guidance on whether the rights of a nominee director or a director who is representing a corporate shareholder of the company to information ought to be limited. While it is clear that such a director has the same rights as other directors as explored above, it has been opined that it may indicate a lack of good faith and loyalty for the nominee to pass on information about the company back to his principal.

Such a view has nonetheless been criticised on the basis that it may be commercially unrealistic to subject a nominee director to such a restraint, as this substantially reduces the benefit to be derived by a shareholder in appointing his nominee on the board of the company given that the primary
reason for such appointment is to represent and report back to his principal. However, notwithstanding this criticism, there appears to be a consensus that the conduct of a nominee director must still accord with a bona fide belief that the interests of the company is likewise being advanced\textsuperscript{12}. Consequently, the right of access may still be excluded if there is a clear conflict of interest on the part of the nominee director. This could arise where a person is nominated to the board of a company for the purpose of finding out information useful to the principal in competing with the company or deciding whether and on what terms to make a takeover bid\textsuperscript{13}.

**Conclusion**

It is clear from the above that section 167 of the Act confers the directors of a company an absolute right to inspect records of the company. Directors, generally, need not provide a reason for exercising such a right. However, such right must be exercised in conjunction with the fiduciary duties of good faith, care, skill and diligence that the director owes to the company. If a director intended to exercise his right for an improper purpose that was inconsistent with his duties as a director, then he can be restrained from doing so. The burden of proving that the director intended to use his right of inspection for an improper purpose lies on the party making such an assertion.

As far as shareholders are concerned, their rights and access to the company’s documents are more limited. In small or family owned companies where, very often, the distinction between ownership (shareholders) and management (directors) is blurred, this may evidently pose a problem to a shareholder who is not a director as such a shareholder will not be entitled to inspect the company’s records unless it can be established that inspection is necessary with reference to some specific dispute or question in which the shareholder is interested.

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\textsuperscript{1} Section 157  
\textsuperscript{2} Section 170  
\textsuperscript{3} Edman v Ross (1922) SR (NSW) 351  
\textsuperscript{4} Section 4  
\textsuperscript{5} Paul Nicholson v Faber Medi Serve Sdn Bhd [2002] 1 MLJ 355  
\textsuperscript{6} Loh Yoon Sang v Ivory Pearl Sdn Bhd [2003] 7 CLJ 405  
\textsuperscript{7} Oxford Legal Group Ltd v Sibbiasbridge Services Plc [2008] EWCA Civ 387; [2008] All ER (D) 263  
\textsuperscript{8} supra  
\textsuperscript{9} Boulous Carteri; Re TARBS (2006) 24 ACLC 46; [2005] NSWSC 891  
\textsuperscript{10} Raffles Hotel Ltd v L Rayner [1965] 1 MLJ 60  
\textsuperscript{12} Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150  
\textsuperscript{13} Rachagan, Pascoe & Joshi, Principles of Company Law in Malaysia, (2002), Malayan Law Journal, pp 380 -381